

No. 12000

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY LYNN
DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED STATES
OF AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

SEP -8 1948

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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WILBUR, BECKETT, OPPENHEIMER,
MAUTZ & SOUTHER, and
ARNO H. DENECKE,

1001 Board of Trade Building,
Portland, Oregon,
for Appellee;

FRANCIS F. YUNKER,

Journal Building,
Portland, Oregon,
for Appellant.

In the District Court of the United States
for the District of Oregon

No. Civ. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
GERTRUDE I. DOWNING and
PERRY LYNN DOWNING, SR.,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges:

I.

Plaintiff was and is now a resident of the State
of Oregon.

II.

The defendants, Gertrude I. Downing and Perry
Lynn Downing, Sr., were and are now inhabitants
of the State of Oregon.

III.

This action arises under 38 U.S.C.A. 445 as here-
inafter more fully appears.

IV.

Perry Lynn Downing, Jr. hereinafter referred to as the deceased, entered the military service of the United States of America on or about December 9, 1942, and thereafter entered into a contract of National Service Life Insurance in the principal amount of \$10,000.00 with the defendant, United States of America, payable upon his death.

V.

That on the date that the deceased applied for such insurance, he was unmarried, and at that time he designated as the principal beneficiary of said insurance, his mother, the defendant, Gertrude I. Downing and as contingent beneficiary of such insurance, his father, the defendant Perry Lynn Downing, Sr.

VI.

That on or about September 4, 1943, the deceased married the plaintiff. [1*]

VII.

That at some time after said marriage, the exact date being unknown to the plaintiff, the deceased changed beneficiaries of said insurance policy and designated his wife, the plaintiff, as principal beneficiary of said policy and his mother, the defendant, Gertrude I. Downing, as contingent beneficiary.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VIII.

That on or about October 3, 1945, while said insurance was in full force and effect, and when the deceased was in the military service, the deceased was killed and by reason of the aforesaid, the proceeds and benefits of said insurance policy became due and payable to the plaintiff.

IX.

That after said benefits became payable, the plaintiff filed a written claim with the Veterans Administration, and the Veterans Administration decided that the defendant, Gertrude I. Downing, was entitled to the benefits of the insurance.

X.

The plaintiff appealed from said decision of the Veterans Administration to the Administrator of Veteran's Affairs using words showing an intention to claim said benefits and the Board of Veterans Appeals, acting in the name of the Administrator of Veterans Affairs, denied said claim and appeal in an opinion dated October 13, 1947 and numbered Docket No. M-15,798.

XI.

That the proceeds of said insurance policy have been and are now being paid to the defendant, Gertrude I. Downing.

Wherefore, plaintiff prays that she be designated principal beneficiary of said insurance policy, that the Veterans Administration pay to her the benefits of such policy in the amount of \$10,000.00, according to the tenor of the policy, that out of said

benefits the Veterans Administration be directed to pay to [2] plaintiff's attorneys a certain percentage of such benefits determined and allowed by the Court as a reasonable attorneys' fees, and for her costs herein.

WILBUR, BECKETT,
OPPENHEIMER, MAUTZ
& SOUTHER,

/s/ By ARNO H. DENECKE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Complaint by copy, as prescribed by law, is hereby admitted, at Portland, Oregon, this 3rd day of December, 1947.

/s/ EDWARD B. TWINING,
Attorney for United States.

[Endorsed]: Filed December 3, 1947. [3]

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Gertrude I. Downing and Perry Lynn Downing, Sr., and in answer to the plaintiff's complaint filed herein, admit, deny and allege:

I.

Admit paragraphs I, II, III and IV.

II.

Deny paragraph V except as is hereinafter expressly admitted, qualified or alleged.

III.

Admit paragraph VI.

IV.

Deny paragraph VII.

V.

In answer to paragraph VIII admit that on or about the 3rd day of October, 1945 while the said insurance was in full force and effect, the said deceased was killed while in the military service. Deny each and every other allegation therein contained.

VI.

Admit paragraphs IX, X and XI.

For a further and separate answer and defense, these answering defendants allege:

I.

That this plaintiff and these defendants, Gertrude I. Downing [4] and Perry Lynn Downing, Sr., were at all times herein mentioned and now are inhabitants of the State of Oregon.

II.

That this action arises under 38 U.S.C.A. Section 445 as hereinafter more fully appears.

III.

That Perry Lynn Downing, Jr., hereinafter referred to as the deceased, entered the military service of the United States of America on or about the 9th day of December, 1942, and thereafter en-

tered into a contract of National Service Life Insurance in the principal amount of \$10,000.00 with the defendant, United States of America, payable upon his death.

IV.

That the last change of beneficiary made by the said deceased prior to his death was on or about the 6th day of November, 1943, at which time he designated his mother, the defendant herein, as beneficiary of the said insurance.

V.

That on or about the 4th day of September, 1943, the deceased married the plaintiff herein.

VI.

That on or about the 3rd day of October, 1945, while the said insurance was in full force and effect and while the deceased was in the military service, the deceased was killed and by reason of the aforesaid, the proceeds and benefits of the said insurance policy became due and payable to this defendant, Gertrude I. Downing.

VII.

That the proceeds of the said insurance policy have been and are now being paid to this defendant, Gertrude I. Downing.

Wherefore, defendants, Gertrude I. Downing and Perry Lynn Downing, having fully answered the plaintiff's complaint pray that [5] the plaintiff take nothing thereby and that this defendant, Gertrude I. Downing, be designated as principal beneficiary of the said insurance policy, and that the Veterans Administration continue to pay to her

the benefits of such policy according to the tenor of the said policy, that out of the said benefits the Veterans Administration be directed to pay to the defendants' attorney a certain percentage of such benefits determined and allowed by the court as a reasonable attorney's fees, and for her costs herein.

FRANCIS F. YUNKER,
Attorney for Defendants, Gertrude I. Downing and
Perry Lynn Downing.

Due and legal service of the within answer by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 26th day of December, 1947.

/s/ A. H. DENECKE,
Attorney for Plaintiff.

[Endorsed]: Filed December 26, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by its attorneys, Henry L. Hess, United States Attorney, and Floyd D. Hamilton, Assistant United States Attorney, in and for the District of Oregon, and for answer to the complaint filed herein, says:

I.

The defendant admits the allegations contained in paragraphs I, II, III, IV, V and VI of the said complaint.

II.

The defendant denies each and every allegation contained in paragraph VII of said complaint.

III.

In answer to paragraph VIII of said complaint, the defendant admits that on or about October 3, 1945, while said insurance was in full force and effect, and when the deceased was in the military service, the deceased was killed. The defendant denies each and every other allegation therein contained.

IV.

The defendant admits the allegations contained in paragraph IX of the said complaint.

V.

The defendant admits the allegation contained in paragraph X of said complaint. [7]

VI.

In answer to paragraph XI of said complaint, the defendant admits that some of the proceeds of said insurance policy have been paid to the defendant, Gertrude I. Downing, but at the time of the filing of this ction, such payments were stopped pending the determination of this action.

VII.

For a further and separate answer and defense, the defendant, the United States of America, alleges that said Perry Lynn Downing, Jr., deceased, entered active service of the armed forces on December 9, 1942 and effective November 6, 1943 was granted National Service Life Insurance in the amount of \$10,000.00 which was in full force and effect upon the date of his death, in the line of

duty, on or about October 3, 1945, and that the said Perry Lynn Downing, Jr., deceased, designated Gertrude Irene Downing, his mother, principal beneficiary for the full amount of the insurance and Perry Lynn Downing, Sr., his father, contingent beneficiary, and further the said Perry Lynn Downing, Jr., deceased, before his death, on or about October 3, 1945, married Dorothy A. Downing, his wife, and inasmuch as a disagreement has arisen between the plaintiff, Dorothy A. Downing, and defendants, Gertrude I. Downing, Perry Lynn Downing, Sr., and the United States of America, as to the true beneficiary under the policy of insurance of the insured within the meaning of Section 19 of the World War Veterans' Act of 1924, as amended (Section 445, Title 38, U.S.C.A.), the United States of America admits liability under the said insurance policy, but alleges that its liability is limited to the face amount of the policy, and respectfully requests the court to determine the true beneficiary under the said policy and direct payment to the proper party with a release as to liability to any other party.

Wherefore, the defendant prays:

(1) That the court order the plaintiff and Gertrude I. Downing and/or Perry Lynn Downing, Sr., to interplead their respective claims.

(2) That the court adjudge whether the plaintiff or Gertrude I. Downing and/or Perry Lynn Downing, Sr., is entitled to the proceeds of said insurance policy [8]

(3) That the court discharge defendant from

all liability in the premises except to the person it shall adjudge entitled to the proceeds of said insurance policy.

(4) That the court award to the defendant its costs and such other relief as the court may deem proper.

/s/ HENRY L. HESS,
United States Attorney.

/s/ FLOYD D. HAMILTON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, being first duly sworn, say that I am one of the attorneys for defendant United States of America in the within entitled action and that the foregoing Answer is true as I verily believe.

/s/ FLOYD D. HAMILTON.

Subscribed and sworn to before me this 2nd day of March, 1948.

(Seal) /s/ FLORENCE McKAY,
Notary Public for Oregon.

My Commission Expires Sept. 4, 1951.

United States of America,
District of Oregon—ss.

Due and legal service of the within Answer by receipt of a duly certified copy thereof, as required

by law, is hereby accepted in the State and District of Oregon. on the 2nd day of March, 1948.

/s/ ARNO H. DENECKE,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1948. [9]

In the District Court of the United States
for the District of Oregon

No. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
GERTRUDE I. DOWNING and
PERRY LYNN DOWNING, SR.,

Defendants.

FINDINGS, CONCLUSIONS AND JUDGMENT

This matter came on duly and regularly for trial on April 20, 1948, before the Honorable Claude McColloch, Judge, presiding. The plaintiff appeared in person and by Arno H. Denecke (Wilbur, Beckett, Oppenheimer, Mautz & Souther), her attorneys, and the defendant United States of America appeared by Floyd D. Hamilton, Assistant United States Attorney, and the defendants Gertrude I. Downing and Perry Lynn Downing, Sr. appeared in person and by Francis F. Yunker, their attorney.

Evidence was introduced on behalf of the individual parties and authorities were presented and arguments made by the individual parties and the Court took the matter under advisement, and having considered the same and being fully advised in the premises makes the following:

FINDINGS OF FACT

I.

That plaintiff was and is now a resident of the State of Oregon and the defendants Gertrude I. Downing and Perry Lynn Downing, Sr. were and are now inhabitants of the State of Oregon.

II.

That Perry Lynn Downing, Jr. entered the military services of the United States of America on or about December 9, 1942, and thereafter entered into a contract of National Service [10] Life Insurance in the principal amount of \$10,000.00 with the defendant United States of America, payable upon his death.

III.

That on the date Perry Lynn Downing, Jr. applied for such insurance he designated as the principal beneficiary of said insurance his mother, the defendant Gertrude I. Downing, and as contingent beneficiary of such insurance his father, the defendant Perry Lynn Downing, Sr.

IV.

That on or about September 4, 1943, Perry Lynn Downing, Jr. married the plaintiff, and the plain-

tiff continued to be the wife of said Perry Lynn Downing, Jr. until the date of the latter's death.

V.

That after said marriage Perry Lynn Downing, Jr. duly executed a change of beneficiary of said life insurance policy and designated the plaintiff as the principal beneficiary of said policy, but said document was inadvertently lost while it was in the possession of the United States Army.

VI.

That on or about October 3, 1945, while said insurance was in full force and effect and when Perry Lynn Downing, Jr. was in the military service, he was killed and by reason of the aforesaid the proceeds and benefits of said insurance policy became due and payable to the plaintiff.

VII.

That after said benefits became payable the plaintiff filed a written claim with the Veterans Administration and the Veterans Administration decided that the defendant Gertrude I. Downing was entitled to the benefits of said insurance. [11]

VIII.

That the plaintiff appealed from said decision of the Veterans Administration to the Administrator of Veteran's Affairs using the words showing an intention to claim said benefits and the Board of Veterans Appeals, acting in the name of the Administrator of Veterans Affairs denied said claim and appeal in an opinion dated October 13, 1947 and numbered Docket No. M-15,798.

IX.

That a part of the proceeds of said insurance policy have been paid to the defendant Gertrude I. Downing.

X.

That an amount equal to 10% of the amount recovered by the plaintiff is a reasonable fee for the attorneys of the plaintiff.

Based upon the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

I.

That Perry Lynn Downing, Jr. changed the beneficiary of his National Service Life Insurance Policy and designated his wife, the plaintiff, as principal beneficiary of said policy.

II.

That there is legally due and owing the plaintiff from the Veterans Administration the unpaid benefits and proceeds of such policy, to be paid according to the tenor of the policy.

Based upon the foregoing Findings of Fact and Conclusions of Law the Court makes and enters the following:

JUDGMENT

Now, therefore, it is considered, ordered and adjudged that the plaintiff, Dorothy A. Downing, be designated beneficiary of the National Service Life Insurance Policy contracted for by Perry Lynn Downing, Jr.; that the Veterans Administra-

tion pay [12] to the plaintiff, Dorothy A. Downing, such proceeds and benefits of said policy as remain unpaid, such payments to be made according to the tenor of the policy; that the Veterans Administration, out of the payments to be made under this Judgment pay the law firm of Wilbur, Beckett, Oppenheimer, Mautz & Souther sums equaling 10 per cent of each of such payments. Costs to neither party.

Dated this 27th day of May, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

Entered in Docket May 27, 1948.

[Endorsed]: Filed May 27, 1948. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendants, Gertrude I. Downing and Perry Lynn Downing, Sr., above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 27, 1948.

/s/ FRANCIS F. YUNKER,
Attorney for Appellants.

[Endorsed]: Filed June 25, 1948. [14]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 19 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3974, in which Dorothy A. Downing is plaintiff and appellee, and Gertrude I. Downing and Perry Lynn Downing, Sr., are defendants and appellants; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellants, and in accordance with the rules of this Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true, and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken April 20, 1948, and filed in this office in this cause, together with exhibits Nos. 1 to 29 inclusive, filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$12.55, and the cost of filing the notice of appeal is \$5.00, making

a total of \$17.55, and that the same has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of July, 1948.

[Seal] LOWELL MUNDORFF,
Clerk. [19]

In the District Court of the United States
for the District of Oregon

Civil No. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA, GERTRUDE
I. DOWNING and PERRY LYNN DOWN-
ING, SR.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
OF TRIAL

Portland, Oregon

Tuesday, April 20, 1948, 10:30 a.m.

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Arno H. Denecke (Wilbur, Beckett, Oppenheimer, Mautz & Souther), of Attorneys for Plaintiff. Mr. Floyd D. Hamilton, Assistant United States Attorney, appearing on behalf of the United States of America, Defendant. Mr.

Francis F. Yunker, Attorney for Defendants Gertrude I. Downing and Perry Lynn Downing, Sr.

Mr. Hamilton: May it please the Court, I believe it would be appropriate at this time to give consideration to the prayer of the defendant, the United States of America, wherein we have [1*] asked that the Court order the plaintiff and Gertrude I. Downing and Perry Lynn Downing, Sr., to interplead their respective claims.

I believe it would be appropriate at this time for the Court to so order the parties. I so move the Court.

Mr. Yunker: There is no objection on behalf of the individual defendants.

The Court: Take the appropriate order.

Mr. Denecke: The plaintiff waives any right to the amount of insurance that has already been paid to Mrs. Gertrude I. Downing.

The Court: The record will show that. Are you ready to call witnesses?

Mr. Denecke: Yes, your Honor.

DOROTHY A. DOWNING

the plaintiff herein, was thereupon produced as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. You are Mrs. Dorothy A. Downing, the plaintiff in this case? A. Yes.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of Dorothy A. Downing.)

Q. Where do you live?

A. 6552 Northeast Eighth Avenue. [2]

Q. What is your present age?

A. Twenty-three.

Q. Mrs. Downing, you married Perry Lynn Downing, Jr., in September, 1943? A. Yes.

Q. How long had you known Perry Downing?

A. About four years.

Q. You had known Perry Downing about four years?

A. Since I was a sophomore in high school.

Q. Speak louder.

A. Since I was a sophomore in high school.

Q. How long had you—to use the phrase—gone with Perry Lynn Downing, Jr., before you were married?

A. Oh, you say how long had I known him? I had known him ever since grammar school but I had gone with him for four years.

Q. You had gone with him four years?

A. Yes.

Q. But had known him ever since grammar school? A. Yes.

Q. Were you neighbors of Perry Downing's family?

A. Yes, about three blocks from there.

Q. When did you become formally engaged to Perry Downing? A. February 22, 1943.

Q. February 22, 1943? [3] A. Yes.

Q. Where was your husband at that time?

(Testimony of Dorothy A. Downing.)

A. He was in Portland.

Q. Was he in the service yet? A. No.

Q. When did your husband enter the service?

A. He was called away February 26th of that year, 1943.

Q. Of 1943? A. Yes.

Q. Where did your husband first go in the service?

The Court: When were they married?

Mr. Denecke: In September, 1943, your Honor. The engagement, she testified, was in February.

A. He went to Fresno, California, first.

Q. At the time you were married, September, 1943, what was the status of your husband in the Army, do you know? A. He was a student.

Q. He was a student? A. Yes.

Q. What kind of a student?

A. Aviation student.

Q. Where was he stationed at the time of your marriage? A. Santa Ana, California.

Q. Where *were* married?

A. In Santa Ana. [4]

Q. At Santa Ana? A. Yes.

Q. Did you stay and live with your husband, then, after your marriage? A. Yes.

The Court: Are they Catholic people?

A. No.

Mr. Denecke: No, I do not think so, your Honor.

Q. How long were you able to stay with your

(Testimony of Dorothy A. Downing.)

husband from the time you were married? How long did you live with him?

A. Well, all the time except when I came home to have my baby.

Q. When was that? A. In April.

Q. Of what year? A. 1945, I think.

Q. What was your answer?

A. '44 or '45; about '45; yes, '45.

Q. In April, 1945, you came home. You had lived with him, then, from September, 1943, until April, 1945?

A. I came home for a short while, while he was in Victoryville. They couldn't bring their wives there.

Q. You said you were going to have a child. When was that child born?

A. June 20, 1945.

Q. June 20, 1945? [5] A. Yes.

Q. When did you first tell your husband he was going to be a father?

A. Well, when I first knew about it. I think it was in October.

Q. Approximately in the fall of 1944 that would be? A. Yes.

Q. Had your husband ever said anything to you concerning his National Service Life Insurance, commonly called GI Insurance?

A. Only once that I can really remember and that was when we were in Chico. It seems to me it was in January.

(Testimony of Dorothy A. Downing.)

Q. You were in Chico in January. What year was that, do you remember?

A. 1944, I think it was.

Q. January, 1944? A. Yes.

Q. Was it just a short time before you came home to have the baby?

A. Yes. Well, it was 1945.

Q. That would be 1945? A. Yes.

Q. What did your husband say to you at that time?

A. Well, he said he was going to go down and change the beneficiary. [6]

Q. Where did he say he was going to do that, or did he say?

A. Well, it was just the base.

Q. Was going to the base and change the beneficiary?

A. Going to the base and change the beneficiary, and then he came home that evening and said he had, and that was in January.

Q. Of 1945? A. Yes.

Q. Are you certain it was in January, 1945?

A. I can't swear to that, but that is my feeling, I know.

Q. That is your recollection? A. Yes.

The Court: Change it in what way?

Mr. Denecke: Q. Did your husband indicate or say to you how he was going to change his insurance? A. To me.

Q. He was going to change it to you?

(Testimony of Dorothy A. Downing.)

A. Yes.

Q. Did he tell you he was going to change it from whom? Did he tell you from whom he was going to change it? A. No.

Q. Did you know who had been the beneficiary of his insurance up to that time?

A. I surmised it was his mother. I am not sure that it was.

Q. I didn't hear you? [7]

A. I was most sure it was Mrs. Downing or Mr. Downing.

Q. His mother or father? A. Yes.

Q. From that time on, did he ever say anything to you further about his insurance?

A. No, he didn't. He never discussed it.

Q. Did you receive an allotment from your husband? A. Yes.

Q. How much was that allotment?

A. Well, it was \$200 a month, when he was overseas.

Q. That was when he was overseas?

A. Just before he went over.

Q. Let me ask you: Did you receive your husband's death gratuity after his death?

A. Yes.

Q. You came home in April, 1945?

A. Yes.

Q. And your daughter was born in June, 1945?

A. Yes.

Q. When did you last see your husband?

(Testimony of Dorothy A. Downing.)

A. It was in July; it was three weeks after my baby was born that we went down there with Mr. and Mrs. Downing. They took us down.

Q. Where was your husband?

A. Salinas, California. [8]

Q. Had you talked to your husband during that period between April, 1945, and July, 1945?

A. What do you mean, about the insurance?

Q. No. Had you talked with him at all? Had he called you?

A. Oh, yes, frequently.

Q. Frequently?

A. Yes.

Q. What was the date of your husband's death?

A. October 3, 1945.

Mr. Denecke: Mr. Clerk, would you hand the witness Exhibits No. 5 and No. 21? (Documents handed to the witness.)

Q. I will ask you what those are.

The Court: You can tell what they are. What are they, Mr. Denecke?

Mr. Denecke: If the Court please, Exhibit No. 5 is the Personal Affairs Statement signed by Perry Lynn Downing, Jr.

The Court: There is no dispute between you lawyers as to the contents of any of these exhibits?

Mr. Denecke: No, there is not, your Honor.

The Court: Or their authenticity?

Mr. Hamilton: No, your Honor.

Mr. Yunker: No, your Honor.

The Court: You have examined them among

(Testimony of Dorothy A. Downing.)

yourselves and you all agree they are what they purport to be?

Mr. Denecke: Yes. [9]

The Court: Then you won't need any further testimony about them.

Mr. Denecke: I wanted to bring out the circumstances surrounding the receipt of that.

The Court: Call the number of the exhibit for the record.

Mr. Denecke: You received Exhibits No. 5 and No. 21 from the Army, did you? A. Yes.

Q. It is noted on Exhibit No. 5 that Dorothy A. Downing is the beneficiary of Perry Lynn Downing's National Life—National Service Life Insurance policy. Did you believe that was the notification that you received of his change of beneficiary to you? A. Yes.

Q. And the letter, Exhibit No. 21, the letter of transmittal, states that this was sent to you as beneficiary, does it not? A. Yes.

The Court: What is the date of the letter?

A. January 24, 1945.

The Court: What year? A. 1945.

Mr. Denecke: I hand you Pre-Trial Exhibits No. 4 and No. 20 and will ask you if you received Exhibit No. 4 or a document exactly like is signed by your husband? [10] A. Yes.

Q. Together with a letter of transmittal, Exhibit No. 20, in which it states again that you are the beneficiary? A. Yes.

(Testimony of Dorothy A. Downing.)

The Court: That first letter you have in your hand, where was it addressed to? Where? Portland, Oregon, or where?

The Clerk: Portland, Oregon.

The Court: What is the date?

The Clerk: January 24, 1945.

The Court: Then you were living in Portland when you received that letter?

A. It was sent to my mother, at her home.

Mr. Denecke: Q. It was sent to your mother in Portland? A. Yes.

Q. You were in Chico at that time?

A. Yes, and I had been home.

The Court: He had not gone overseas then?

Mr. Denecke: No, your Honor.

The Court: Did he see that letter?

Mr. Denecke: I don't know, your Honor.

Q. Did you ever show those letters or those Personal Affairs statements, the pre-trial exhibits I have shown you—Did you ever show those to your husband? A. He knew that I had them.

Q. Did he ever see them, do you know? [11]

A. I can't remember that at all.

The Court: He did know you had them?

A. I told him about receiving them.

The Court: What did he say? Did he seem surprised?

A. No. There was really nothing very much said about it at all.

(Testimony of Dorothy A. Downing.)

The Court: Where were they kept? Did your mother keep them? A. Yes.

The Court: Here in Portland? A. Yes.

The Court: She kept them for you?

A. Yes.

The Court: You wanted her to do that for you?

A. Yes.

The Court: Did she have a safety deposit box or something? A. Yes.

The Court: Did she keep them in the family safety deposit box? A. Yes.

The Court: Did you have a father living?

A. Yes.

The Court: What is your father's business?

A. He works for the Iron Fireman, a tool and die maker.

Mr. Denecke: Q. At the time your husband was sent overseas [12] where did he send his belongings?

A. He sent some home to me and one locker to Mrs. Downing.

Q. Some to you and one locker to his mother, Mrs. Gertrude I. Downing? A. Yes.

Q. Do you know what effects Perry Lynn Downing sent to his mother? A. No, sir.

Q. Not specifically, but I mean just in general. Clothes? A. His clothes, yes.

Q. Clothes?

A. Yes, as far as I remember.

Q. Will you speak up louder?

(Testimony of Dorothy A. Downing.)

A. Mostly his clothes.

The Court: How old is this girl?

Mr. Downing: She testified she is twenty-three now, your Honor.

Q. How old was your husband at the date of his death?

A. He was—He would be twenty-one in December.

Q. He would have been twenty-one in December, 1945?

The Court: What high school did you and he attend?

A. He graduated from Benson High School and I graduated from Jefferson.

The Court: That is as far as you went to school, either one of you? [13] A. Yes.

The Court: Did you say your families lived near each other? A. Yes, three blocks.

Mr. Denecke: Q. What did your husband do after he got out of high school in the way of working?

A. Well, he worked in the shipyards.

Q. How long, approximately, did he work in the shipyards?

A. Until he went into the service.

Q. Do you know what job he had there?

A. It seems to me it was boilermaker.

Q. I couldn't hear you, Mrs. Downing.

A. It seems to me he was a boilermaker.

(Testimony of Dorothy A. Downing.)

Q. From that job he went into the service, is that correct? A. Yes.

The Court: Did you go to the same grammar school? A. Yes, we did.

Mr. Denecke: Q. What was your husband's job in the Army?

A. He was an aviation cadet. He was in the Air Corps.

Q. You said he was an aviation cadet. What did he do when he went overseas?

A. He was a flier.

Q. He was a flier? A. Yes.

Q. What was his rank at the time of his death?

A. Second Lieutenant.

The Court: What kind of flying did he do, do you know?

A. Well, he flew a P-38 for a while and then he was on heavier airplanes.

The Court: What was he doing when he lost his life? A. He was flying freight.

The Court: He was a combat flier in the Philippines? Had he gone over as a combat flier?

A. Yes.

Mr. Denecke: Q. Your child is alive and well today, is she not? A. Yes.

Q. Where are you and the child living?

A. With my mother and father.

Q. Here in Portland? A. Yes.

Q. Your husband did go to see his child before he went overseas, is that correct? A. Yes.

(Testimony of Dorothy A. Downing.)

Mr. Denecke: That is all I have, your Honor.

Cross-Examination

By Mr. Yunker:

Q. Mrs. Downing, about this change of beneficiary: Would you tell the Court what was said by your husband? What brought up this conversation in January, 1945? [15]

A. Well, really nothing at all; just came out of a clear blue sky. He said he was going to go down and change his beneficiary. All I said was, "Oh."

Q. Is that all that took place? A. Yes.

Q. That is all the conversation you had?

A. Then, when he came home in the evening, he said he had changed it. I have forgotten what I said, but it was to the effect that it didn't matter.

Q. Who said it didn't matter?

A. I did. I said, "You expect to come back, don't you?"

Q. There was nothing said about who had been the beneficiary, was there, or who was to be the beneficiary? A. No.

Q. There was nothing said?

A. Yes, he said that he was going to change it to my name.

Q. Take it out in your name? A. Yes.

Q. At that time you had been married for almost two years, hadn't you? A. Yes.

Q. Had he ever mentioned insurance before that?

(Testimony of Dorothy A. Downing.)

A. Neither one of us did, as far as I can remember.

Q. Was there anything that brought up the subject in January?

A. No, only the fact, I imagine, that it was about the time [16] when the fellow had to change their—not change, but to fix up their personal affairs. That is the only thing I can figure out why he was planning doing that, but I had not ever said anything to the effect that I wanted him to do it.

Q. How do you place this date as January, 1945?

A. Well, I can remember it this way, that we were in this home and then we moved to another place, and it seems to me it was in just about that time.

Q. About that time? A. Yes.

Q. Aren't you basing it upon these Personal Affairs statements introduced in evidence, No. 5 and No. 21?

A. No, I am not. Well, I just don't know, but that was the way I had figured it out, because we only had about three months to live in this last apartment before we would have to give it up.

Q. Did you see your husband after that, after you left Chico and came back to Portland to have the baby? A. Yes.

Q. When did you again see him?

A. Just before he went. It was about in June, I believe.

(Testimony of Dorothy A. Downing.)

Q. Did he come up on a furlough?

A. Yes, April.

Q. Did you discuss this insurance in any way at that time? A. No, not at that time. [17]

Q. Did you discuss these documents, these Personal Affairs statements at any time after that conversation in January, 1945?

A. Well, yes, just that I told him that I had received them. That is the only thing that I said.

Q. Did you tell him that by letter or by conversation? A. No, by conversation.

Q. When was that?

A. When he was here in Portland.

Q. When he came to Portland, wasn't there a little difficulty between you and your husband?

A. No, there wasn't.

Q. Where did he stay when he came home on that last furlough?

A. With me. What do you mean, where did he stay?

Q. Didn't Mr. Downing stay at his mother's home?

A. Well, we took turns. He stayed home and then he stayed at Mrs. Downing's home.

Q. As a matter of fact, didn't he stay at his own home and you stay at your home?

A. No.

Q. Are you sure?

A. I certainly can't remember it.

Q. Do you remember an incident when he came

(Testimony of Dorothy A. Downing.)

home on his last furlough, when you refused to go to dinner with him at one of his relatives? [18]

A. I can't remember that.

Q. When Lieutenant Downing left for overseas --That was about July, wasn't it, 1945?

A. Yes.

Q. ---of course, his personal belongings were sent home, weren't they? That is correct?

A. Yes.

Q. He had a trunk, didn't he? A. Yes.

Q. Where did that trunk go?

A. One trunk went to me and one to Mrs. Downing.

Q. What was the nature of the trunk that his mother got, do you know?

A. Well, clothes, mostly.

Q. What is that? A. Clothes, I guess.

Q. What was in the trunk that you got?

A. Well, it was his clothes that he wore right at the last that were in Mrs. Downing's trunk and the ones—Well, kind of had them half—You know—

Q. What was in the trunk that you got?

A. Well, his uniform.

Q. That is all, just his uniform?

A. No, had some of his shirts, and I gave Mrs. Downing some of his things. [19]

Q. However, the trunk that contained his personal belongings went to his mother? A. No.

Q. Didn't you go over to the Downings, that is,

(Testimony of Dorothy A. Downing.)

Lieutenant Downing's mother, and go through that trunk and take what you wanted?

A. There was just a few little things like—only dirty clothes that he had put in the trunk.

Q. Wasn't there a book, a little memorandum book there? Isn't that right? A. Yes.

Q. Wasn't that book the cause of a little trouble between you and your husband? A. Yes.

Q. As a matter of fact, Mrs. Downing, didn't you consult an attorney about a divorce?

A. No, I didn't.

Q. Did you write to your husband that you were planning to?

A. No. I said to him—I told him I found this book and if it was true that it just couldn't go on, but I said if I was accusing him unjustly I probably would regret it for the rest of my life. I didn't say anything that I was planning on getting a divorce. I just said it could not go on that way.

Q. How long did this trouble continue? Didn't it continue [20] on?

A. Just for a short time.

Q. How long?

A. I think it was about—Let's see—about a month and a half, I believe it was.

The Court: Look, Mr. Yunker. This is all after the time they claim he changed the beneficiary.

Mr. Yunker: That is correct, your Honor. However, what I want to connect up is this: These letters relate to this affair and also he says in there

(Testimony of Dorothy A. Downing.)

that "We never did get along from the beginning," from the time they were first married. I appreciate the suggestion, your Honor.

Q. As a matter of fact, did your husband decide he was going to stay in the service for thirty years?

A. Well, he wrote me a letter to that effect and asked me what I thought about it. He said it was my life, too. That was after we had the argument.

Q. Didn't he say that from the beginning, while he was in the States?

A. He had talked some about it but I tried to talk him out of it because I didn't care for a flying life.

Q. He talked about staying in the service as a career while he was in the States, didn't he?

A. Well, he was—I don't know—Neither one of us knew.

Q. But he spoke of it, didn't he? [21]

A. Yes, he spoke of it.

Q. At that time were you getting along all right, when he said he was going to stay in the service?

A. Yes.

Q. What reason did he give for wanting to stay in?

A. So he would have a more secure life. I have a letter in which he said that.

Q. Mrs. Downing, I want to ask you this: When this money for the insurance came in to Mrs. Down-

(Testimony of Dorothy A. Downing.)

ing, your mother-in-law, you knew what she did with the money, didn't you?

A. I believe she put it in the bank.

Q. In the name of your child?

A. I don't know what name she put it in.

Q. Has she used any of that money that you know of?

A. She told me she had to buy insurance for Linda, part of it.

Q. Didn't Mrs. Downing tell you her sole purpose was to see that Linda got an education?

Mr. Denecke: I don't think that is pertinent here, and I object to this testimony.

The Court: Go ahead. Ask your question again.

(Question read.)

Mr. Yunker: Q. Isn't that right?

A. Well, I imagine that is what it was for; I don't know. She seemed very nice all the way through until—about the [22] whole thing—She seemed to want Linda to have it.

Q. What is your purpose in case the Court should decide you are entitled to the insurance? What would you do with this money?

Mr. Denecke: I object to that question, your Honor, on the ground it is not relevant at all.

Mr. Yunker: I am showing the motive here, that is the only thing.

The Court: She may answer.

A. I had not really thought much about it, other than taking care of my child.

(Testimony of Dorothy A. Downing.)

Mr. Yunker: Q. As a matter of fact, isn't it your intention, if you prevail, to ask for a lump-sum settlement from the Government?

A. No, I have not talked that over. We have discussed it but were not set on it.

Q. What was your purpose—What would be your purpose in having a lump-sum payment?

Mr. Denecke: I do not wish to be objecting all the time, but I cannot see the relevancy of this. She said she was not going to ask for a lump-sum payment. As a matter of fact, she couldn't get a lump-sum payment under the rules and regulations of the War Department, so I don't see that there is any relevancy.

The Court: You would get a judgment? You want to take a [23] judgment, don't you?

Mr. Denecke: I do, your Honor.

Mr. Yunker: What did you discuss this lump-sum insurance for?

A. When do you mean? When did I discuss it? When I was at the Veterans Bureau, I had asked for a certain amount a month and then, when Mr. Denecke and I discussed it, we didn't exactly—I didn't make any decision. He told me how I could get it, the way I could get it.

Q. Mrs. Downing, you testified you got these forms, Exhibits No. 5 and No. 21 I think, and that those were designations of you as beneficiary?

A. Yes.

Q. Did you read these statements?

(Testimony of Dorothy A. Downing.)

A. Yes, sir, I did.

Q. I will hand you Exhibit No. 4. At the bottom of the back page, I will ask you to read that portion. Did you read that when you got it?

A. Yes, I read it.

Q. Referring to Exhibit No. 5——

The Court: What is that?

Mr. Denecke: That portion, you mean?

The Court: On the bottom of Exhibit No. 4.

Mr. Yunker: It is the same as it is at the bottom of Exhibit No. 5. [24]

The Court: What is it?

Mr. Yunkers: "Instructions: AAF Personal Affairs Statement is not to be used, either as a substitute for, or in lieu of authorized forms or established procedures for effecting desired personal affairs actions. The purpose of this form is to provide a consolidated record of all personal affairs actions taken by previous accomplishment of official forms. Accordingly, prior to signing this statement, any action will be accomplished in the prescribed official manner."

A. No, I didn't read that until later on when we were discussing this.

Mr. Yunker: Q. What was there about these forms that made you think that they were designations of you as beneficiary?

A. They were from the Government.

Q. You have been friendly with your mother-in-law? A. Yes, I have.

(Testimony of Dorothy A. Downing.)

Q. You and she have discussed this insurance problem, have you not? A. Yes, we have.

Q. I will ask you whether or not you have ever seen Exhibits 14, 15 and 16 which the Clerk will show you.

The Court: What are they?

Mr. Yunker: I don't know what their proper designation is. This form certifies the insurance is in effect. It is [25] the prescribed form for notifying the assured that the insurance is in effect. I think it has the same effect as a policy.

The Court: Whom is it signed by?

Mr. Yunker: Signed by the War Department.

The Court: All right.

A. I have never seen these before.

Mr. Yunker: Q. Haven't you and Mrs. Downing, your mother-in-law, discussed this insurance?

A. Yes, but I never have seen these forms before.

Q. Hasn't Mrs. Downing ever shown these to you? A. No, she has not.

Q. Didn't she ask you whether or not you ever received one of those?

A. After it was all over with; she never did before but after I went—She and I went down to find out about it, yes.

Q. Mrs. Downing, you did see these before, didn't you?

A. No, I never have seen these before.

Q. She never showed these to you?

(Testimony of Dorothy A. Downing.)

A. No.

The Court: Before what? She is mixed up.

Mr. Yunker: Q. Before now?

A. I have never seen these before now, no.

Q. You did not see them at the Veterans Bureau before? [26] A. No, I have not.

Q. Have you ever seen any National Service Life Insurance forms such as these are?

A. No. That is what made me believe that this was enough.

Q. After your husband's death, you knew your mother-in-law was applying for the insurance, did you not?

A. She went down with me to find out about it and she seemed like she was very willing for me to have it very much.

Q. You mean she wanted you to have it?

A. She thought that I was—that I should have it.

Q. Was there any question about you having it?

A. Not until we went down and then they declined—I had no idea that we would need any of these. Then, when we went down there and I got a letter from the Veterans stating that Mrs. Downing was the beneficiary——

Q. How much money are you now receiving from the Government for the support of the child?

A. \$78.00.

Q. \$78.00? A. For myself and the baby.

Q. Are you engaged at the present time?

(Testimony of Dorothy A. Downing.)

A. No, I am not.

Q. Engaged to be married?

A. No, I am not.

Q. After the death of your husband, didn't Mr. Downing proceed [27] to sell the car belonging to your husband and give you the proceeds thereof?

A. Yes.

Mr. Yunker: That is all.

Cross-Examination

By Mr. Hamilton:

Q. I would like to ask you this, Mrs. Downing. At the time you and your husband were at Chico, was he a Second Lieutenant then?

A. He was made a Second Lieutenant while we were in Chico.

Q. That represented the final stage of his training as a pilot, is that right?

A. Well, he was made a Flight Officer before, when he graduated; then, when we went to Chico-- I believe it was in May. No. It was just before we left that he was made a Second Lieutenant.

Q. At Chico, do you know whether or not he was training, or what was he doing there? What was his purpose in being there?

A. He was flying P-38s.

Q. In order to get experience in flying that type of plane, is that right? A. Yes.

Q. After he left Chico did he go any place in the United States or did he go overseas?

A. No, he went to Santa Maria, California, and then he went to Salinas. [28]

(Testimony of Dorothy A. Downing.)

Q. Do you know what month he left Chico?

A. I can't be sure. Must have been June.

Q. It was in June. What month did he go overseas?
A. In July, July 27th.

Q. In July? A. Yes.

Mr. Hamilton: That is all.

Redirect Examination

By Mr. Denecke:

Q. Was your husband alerted for overseas movement in December, 1944, or January, 1945?

A. Yes.

Q. Do you know if this was the first time he was alerted for overseas movement?

A. No, he had been alerted quite often.

Q. Both before your husband went overseas and after he went overseas, you received letters from him, did you not?
A. Yes, sir, I did.

Q. In those letters, before he went overseas, he indicated to you he was very happy being married to you, did he not?
A. Yes.

Q. I hand you Pre-Trial Exhibit No. 23, a letter dated July 10th addressed "My darling wife and baby," and ask you if you received this letter from your husband?

The Court: That has all been agreed to. Put them all in. [29] They speak for themselves. You agreed among yourselves that all exhibits are what they purport to be, and the letters are received. You may pick those out for emphasis, if you want to emphasize them in the argument, if you wish.

Mr. Denecke: All right, your Honor.

(Testimony of Dorothy A. Downing.)

Q. When you and Mr. and Mrs. Downing, Sr., were in Salinas to see your husband off, did your husband say anything to his mother about insurance?

A. Not when we were in Salinas but when they drove off in the car, going to Salinas.

Q. When you were driving in the car?

A. Yes.

Q. When was this, or where was it?

A. Well, it was—I can't tell you just exactly where it was but it was going to Salinas from Portland.

Q. It was in the vicinity of Salinas?

A. Well, it was near there, when we were nearing there.

Q. Who was in the car at that time?

A. Mr. and Mrs. Downing, myself, and there was another boy named "Chuck." I can't remember his last name.

Q. What did your husband say to Mrs. Downing concerning this insurance?

A. Well, he said he had everything all straightened out and that everything would go to me anyhow. He knew everything would go to me anyhow.

Mr. Denecke: That is all, your Honor.

Recross-Examination

By Mr. Yunker:

Q. Did your husband, down at Salinas in that automobile, in the presence of the other Downings, say that he had made everything out to you?

(Testimony of Dorothy A. Downing.)

A. As far as I can remember, he certainly did.

Q. What brought up that conversation?

A. Mrs. Downing asked him.

Q. She asked him what?

A. If he had put everything—had gotten all his affairs straightened out. I can't remember the exact words.

Q. As a matter of fact, wasn't this the conversation: They asked if his affairs were in order and he said, "Yes."?

A. There was more to it than that.

Q. Well, how much more? I am not trying to badger you. I would like to know. It is important.

A. Well, we have affidavits to that effect.

Q. I see. How do you remember it?

A. Because we were driving in the car—

Q. How do you remember this conversation? Tell us what it was?

A. I don't know exactly how I could tell you the exact words but I do know we were in the car, and this other boy was with us. [31]

Q. Mrs. Downing, isn't it a fact, isn't that the time when you and Mr. and Mrs. Downing drove down to see him before he left? A. Yes.

Q. Isn't that right? A. Yes.

Q. When you first saw him—

A. Wait a minute—It was after, when we were with them. We met them in Chico and then we went to Salinas and then took him with us to Salinas.

(Testimony of Dorothy A. Downing.)

Q. That happened in Chico, didn't it?

A. Yes.

Q. As a matter of fact, when you first saw your husband when you drove down that June, when you first saw him, what did he say? What I am trying to get at is this: He kissed his mother first, didn't he?

A. No, he didn't.

Q. Did he kiss you or talk to you at all?

A. Yes, he did. He came up to the window and said, "Hello" to Mrs. Downing and came back to me. He said "Hello" to all of us, and then came over.

Q. And he drove down the road in the front seat with his father?

A. I was back near the baby when he rode in the front seat, because this other boy was there.

Q. Didn't you and your husband have an argument over the fact that he did not greet you properly or was not friendly enough to you?

A. No, we didn't. I was hot and tired, I know that, but that was the only thing. We never had any words. I had just gotten out of the hospital.

Mr. Yunker: That is all.

The Court: That is all.

(Witness excused.) [33]

GLENN BAUMAN

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

(Testimony of Glenn Bauman.)

Direct Examination

By Mr. Denecke:

Q. You live in Portland, Mr. Bauman?

A. Yes, sir.

Q. Where is your residence?

A. 4720 Northeast Davis.

Q. How long have you lived in Portland?

A. Since I returned from the service.

Q. In the service did you know Perry Lynn Downing, Jr.?

A. Yes, sir, I did.

Q. You were in the same outfit he was in the service?

A. Yes.

Q. How long were you in the same outfit with him?

A. We were stationed together at Chico for the whole time we were there.

Q. When did you come to Chico?

A. We entered Chico in October, 1944.

Q. Did you know Lieutenant Downing quite well?

A. Yes, sir, I did.

Q. Did he ever say anything to you about his GI insurance?

A. Yes, we had discussed it, oh, at least once that I can remember of. [34]

Q. What did he say to you on that occasion?

A. Well, it happened right after our leave up here in April of 1945. We had gone back—We had flew back from here—and we were prepared to go overseas; we were alerted at the time, and he had

(Testimony of Glenn Bauman.)

told me that he was going to change his beneficiary—change his insurance. I had known at the time that his mother was beneficiary before that, and both of us went in at the same time to change.

Q. Went in where?

A. In Headquarters, in Chico, California.

Q. This conversation——

The Court: Wait a minute. He said both of them went in at the same time to change insurance. He started to tell something about it.

A. Yes, both of us did.

The Court: That is the sentence or wording you used a minute ago. A. That is right, sir.

The Court: Then you were interrupted in some way. Go on and finish. When did that happen?

A. That happened right after our leave in Portland here in April, 1945.

Mr. Denecke: Q. Then, what happened?

A. We went in and, as far as I know, he changed his insurance. I know he filled out——

Mr. Yunker: That is objected to.

The Court: Just state what you know.

A. We went in and, as far as I know, he filled it out. I didn't pry into his affairs. I didn't think it was any of my business, but he had told me after we came out that he had everything straightened out as far as his insurance was concerned. I didn't ask him whether it was to his wife or whether it was to his mother, but I took it it was for his mother—I mean, for his wife, rather.

(Testimony of Glenn Bauman.)

Q. At that time did you fill out a Personal Affairs Statement? A. Yes, sir, I did.

Q. You went to Headquarters. Was that the place that soldiers would go to make a change of insurance beneficiary?

A. That is the only place.

Q. Did he indicate to you beforehand to whom he was going to change his insurance?

A. No, he didn't say exactly, but he said he was going to change his beneficiary.

Q. Did he say afterwards, when he came out of Headquarters—What is your best recollection of what he did say?

A. Well, he said he had taken care of it. I presumed he had changed it because that is what he told me he went in—That is what he told me before we went in.

Q. Did he say anything further?

A. Not exactly that I remember of. That is about all that [36] was said.

Q. I hand you Exhibit No. 19. That is a Personal Affairs Statement signed by you. Is that the Personal Affairs Statement you received, the one you made out this time you went in with Lieutenant Downing? A. No, it is not.

Q. It is not?

A. No, it is not. This is—Wait a minute. Yes, it is. 31st of May. I take that back. It is.

Q. That is dated the 31st of May, 1945?

A. That is right.

(Testimony of Glenn Bauman.)

Q. At the time you and Lieutenant Downing went in Headquarters and made these declarations you mentioned, you received later a copy of this Personal Affairs Statement?

A. Yes, sir, I did.

The Court: What is your point about that?

Mr. Denecke: Your Honor, we have no Personal Affairs Statement dated the 31st of May. We have no document dated at that time. My only conclusion is that apparently they lost any document that Lieutenant Downing filled out at that time.

The Court: I still do not follow you. What is the evidential value of what you just said?

Mr. Denecke: It fixes the date, your Honor, when Lieutenant Bauman went into Headquarters at the time Lieutenant Downing went into Headquarters. [37]

The Court: He said that is not the one.

Mr. Denecke: And then he changed his testimony, your Honor.

A. Yes.

Mr. Denecke: Q. How long were you together with Lieutenant Downing before you went overseas?

A. Well, actually, he and I were together from the time we left Portland here in April until—It was approximately the 2nd of June of 1945 when we left for overseas. I left before he did from Santa Maria, California.

Q. What year was that? A. April, 1945.

Q. During that time you were with him, did he

(Testimony of Glenn Bauman.)

ever tell you that he and his wife were not getting along?

A. No, he didn't. He never mentioned anything about it.

Q. During that period from April, 1945, until you went overseas, were you the only two left at Chico of the old outfit?

A. No, there was approximately fifteen of us, I believe, but he and I were more so together than myself and someone else.

Q. When you and Lieutenant Downing were in Headquarters, at the time you referred to, did he make out some document of some sort?

A. Yes, he did.

Mr. Denecke: That is all, your Honor. [38]

Cross Examination

By Mr. Yunker:

Q. How do you know he made out any document?

A. The reason I know is because we were forced to make them out at the time. In other words, we were told that we must make them out before we would go overseas.

Q. When had you made your last Personal Affairs Statement before May 31st?

A. When did I make one out before that?

Q. Yes.

A. I believe it was in December, the year before.

Q. The only reason you have for thinking that Lieutenant Downing made out a Personal Affairs

(Testimony of Glenn Bauman.)

Statement is because everybody else was told to make them out?

A. That is right. You could not clear the base unless you made one out.

Q. Did I understand you to say the date of this conversation was May rather than March?

A. May, I believe.

Q. This Personal Affairs Statement you refer to shows it was made out on May 31st, 1945, is that correct? A. Yes, right.

Q. Is that the date you had the conversation then, rather than in March, as you first testified?

A. No, I didn't testify that we made it in March.

Q. Or April, 1945, rather?

A. That is right.

Q. He told you, then, in May, 1945, that his mother was the beneficiary under the policy at that time, didn't he? A. No, he didn't.

Q. What did he say?

A. I had known it before he had gone in and made that—Before we went in, we lived here in Portland and I had known his mother was the beneficiary.

Q. Was his mother the beneficiary to your knowledge in January or February, 1945?

A. She must have been. He told me in April.

O. He told you in April that his mother was the beneficiary prior to that time? A. Yes.

Mr. Yunker: That is all.

Cross Examination

By Mr. Hamilton:

Q. When you went into Headquarters at Chico

(Testimony of Glenn Bauman.)

concerning this Personal Affairs Statement, making out this Personal Affairs Statement, Lieutenant Downing accompanied you. Did you see him fill out any form or anything?

A. Yes, sir, I did.

Q. You saw him? Was he seated?

A. No, we were standing up. [40]

Q. Standing up? A. Yes.

Q. You were together? A. Yes.

Q. You can testify that he filled out some paper at that time, is that correct? A. Yes, he did.

Mr. Hamilton: That is all.

Recross Examination

By Mr. Yunker:

Q. How many people were in this room at the time you were making out the forms?

A. I wouldn't say.

Q. Who else was there besides you and Downing? A. Lieutenant Bruce Kummer for one.

Q. Did he make out a form?

A. Yes, he did.

Q. You remember he was making out a form at the time? A. Yes.

Q. How do you remember he was making out a form at the time?

A. Because the three of us were together at the time. That is what we went in there for.

Q. You say you made a Personal Affairs Statement prior to that time, in December, 1944?

A. Approximately. [41]

(Testimony of Glenn Bauman.)

Q. Who was in the office with you at that time?

A. I would not even remember.

Q. What caused you to remember the occasion in 1945?

A. Because we had been in Chico, the three of us, and there was—well, about six or seven families that knew each other pretty well, and we had been running around down there together; there were approximately six or seven of us, I would say, down there that were together most of the time in the evenings or else meeting some place.

Q. Were you married at the time?

A. Yes, I am.

Q. At that time, were you married?

A. Yes, I was.

The Court: Your wife was down there with you?

A. Yes, sir.

The Court: You were running around together, you say?

A. That is the reason that I remember it, because we were together most of the time.

Mr. Yunker: Q. You have no independent memory of this particular event taking place on May 31, 1945, have you? A. Not me, no, sir.

Q. The Clerk will hand you Exhibit No. 19. Would you look at that and see if that is the date that was executed.

A. That is the date I received it.

Q. Where is the date shown when it was executed? [42]

A. Well, I say, I didn't know the date but I

(Testimony of Glenn Bauman.)

know that this was made out in order to come out the 31st of May, 1945. We didn't receive these when they were made out.

Q. If you will read that, doesn't that say that this is your status on the 31st—as of the 31st day of May, 1945?

A. That is right. We would go in and fill out our forms and they would type them up and put down the date when this thing was to take effect.

Q. When what thing was to take effect?

A. Well, the Personal Affairs Statement.

Q. If you will look at that, Mr. Bauman: That is only a statement, is it not, of what your situation was and who your beneficiary was?

A. That is right.

Q. There is nothing to take effect on that Personal Affairs Statement, is there?

A. What do you mean, "take effect"?

Q. You say that statement was made out and it was to take effect May 31st. As a matter of fact, it was executed on May 31st, was it not?

A. That is right.

Q. It was made out on May 31st and signed by you on May 31st? A. Yes.

Mr. Denecke: I think counsel is misleading the witness, because it does not state it was executed on May 31st. [43]

The Court: I wonder if I understood you correctly when you first came on the stand. You said you went in to change your beneficiary?

A. That is right.

(Testimony of Glenn Bauman.)

The Court: To change the beneficiary of your life insurance?

A. No; mine was remaining the same, but I was adding another beneficiary on it.

The Court: You say you and the deceased Lieutenant were discussing insurance and you both went in on the same mission.

A. That is right, sir.

The Court: Among other things, but particularly as to that?

A. Yes.

Mr. Yunker: Q. Who had been your beneficiary prior to this statement?

A. Mine?

Q. Yes.

A. My wife.

Q. Your wife. Who was your contingent beneficiary before that?

A. My wife was my beneficiary from the time I graduated.

Q. Who was your contingent beneficiary?

A. My mother and father.

Q. How did you change it when you went in?

A. To my son.

Q. You added your son?

A. That is right.

Q. And took your mother and father off?

A. That is right.

Q. Mr. Bauman, isn't it true that according to this Personal Affairs Statement, the statement that you signed shows your wife is beneficiary and your father and mother are contingent beneficiaries?

A. That is right. It is on here.

Q. What do you mean when you say you went in to change your beneficiary? Your wife had been principal beneficiary and your mother and father

(Testimony of Glenn Bauman.)

contingent beneficiaries. You went in and changed it by this document and it still remains the same. Can you explain that?

A. I must have changed mine at a later date.

Q. Then this conversation and everything you are speaking of refer to that different date?

A. No, I just said the last part of it, the part of it about changing the beneficiary.

Q. As far as you know now, you had no conversation at that time about it?

A. Oh, yes, we did.

Mr. Yunker: That is all. [45]

Redirect Examination

By Mr. Denecke:

Q. What was the date of your leave and Lieutenant Downing's leave in April?

A. April 12, 1945.

Q. How long a leave was it?

A. Until the 27th.

Q. You got back in Chico on the 28th?

A. I believe it was the 28th.

Q. And this conversation with Lieutenant Downing you are certain took place after you were both on leave?

A. Yes, it did.

Q. This conversation relating to the change of beneficiary that I am referring to, that is the one that took place after your leave?

A. Yes, that is right, sir.

Mr. Denecke: That is all, your Honor.

(Witness excused.)

Mr. Denecke: The plaintiff rests.

The Court: How about your exhibits? Have you put your exhibits in?

Mr. Denecke: I will offer all pre-trial exhibits, your Honor, in evidence as trial exhibits.

The Court: Do you wish to reserve objections to the [46] exhibits?

Mr. Yunker: Well, we do, your Honor. We have not looked at them all. I wonder if we might have time to look at them.

The Court: You can do that during the noon hour.

Mr. Yunker: All right.

The Court: Mr. Denecke, you rest now, subject to any objection to the exhibits?

Mr. Denecke: Yes, your Honor. I do not think there will be any difficulty.

The Court: You gentlemen settle that during the noon hour. Go ahead with your testimony, Mr. Yunker. [47]

TESTIMONY OF DEFENDANTS GERTRUDE

I. DOWNING and PERRY LYNN DOWNING, SR.

PERRY LYNN DOWNING, SR.,

was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. Mr. Downing, you are one of the defendants

(Testimony of Perry Lynn Downing, Sr.)

in this case and the father of Perry Lynn Downing, Jr.?

A. That is right.

Q. Mr. Downing, when did the boy get married, do you remember approximately?

A. He got married on my 25th anniversary. That would be the 4th of September, 1943.

Q. Did he come back on furlough or visit you at any time?

A. Yes.

Q. When was that?

A. Well, let's see. He was home on one furlough for two weeks right along in April. I know we went fishing, salmon fishing.

Q. Was he married at that time?

A. Yes.

Q. April, 1945?

A. Wait a minute. Was he married? He evidently was married in 1944—1943. [48]

Q. He came back on a furlough. How long did he remain?

A. He was around two weeks, I think it was, or ten days, something like that; right around in there.

Q. Where did he stay when he came home?

The Court: Wait a minute. When was he married?

Mr. Denecke: September, 1943, your Honor.

The Court: Let's don't flop around about such a small thing. We are all agreed on that date?

Mr. Yunker: That is correct.

The Court: Get it straightened out, to be sure.

Mr. Yunker: Q. He was married in September, 1943?

A. Okeh.

Q. Where was he married?

(Testimony of Perry Lynn Downing, Sr.)

A. He was married at Chico, California.

Q. Was it Santa Ana or Chico?

A. Santa Ana.

Q. Then it was the next year or the following year that he came home, 1944 or 1945?

A. He was home twice. He came home and we went salmon fishing. He was married at that time, I am sure. Then he came home another time after that date.

Q. The time he came home after he was married?

A. Yes.

Q. Where did he live?

A. Stayed at our place and over at his wife's mother's place. [49]

Q. Did they stay together at all times, he and his wife, or not?

A. Most of the time.

Q. Was there any time he came home and stayed alone at night?

A. Well, yes, there was.

Q. Did you hear or notice anything about the manner in which he and his wife were getting along at that time?

A. At that time I didn't notice anything. He would never say anything. He kept everything quiet to himself.

Q. Then, when did you first notice anything?

A. Well, when we went down to see him off. We was not supposed to be down to see him, but we went down to Chico and, well, the first time I noticed is when I wanted him to take some fish over to his wife's folks and he said, "No, give them nothing," and I thought it was funny. I never

(Testimony of Perry Lynn Downing, Sr.)

asked any questions. As it was, I got him to take some fish over, anyway—I had three fish, and there was three of us fishing and I wanted to give each one a fish but he wouldn't take it. He said, "Nothing doing." I thought that was funny.

Q. Then what was the next thing?

A. Then, when we went down to Chico to see him, we missed him at the airport. He was to be at the airport. He was up at the swimming tank, and we were hot and tired and we went into Chico to get something to eat and he had heard about us [50] being there on the loud speaker, and he came in, right in behind us, and as he glanced back he noticed it was us, and he came back and kissed his mother and ignored Dorothy. I thought it was funny but I never asked any questions.

Q. Did that cause some difference between him and his wife at that time?

A. Sir?

Q. Did that cause a little argument?

A. She didn't like it very well, but I never said nothing because I didn't want them to have any trouble.

Q. Of course, you received letters from your son explaining the situation of how he felt towards his wife?

A. I did afterwards, yes.

Q. When your son was overseas who got his personal effects, do you know? Whom did he send them to?

A. There was one trunk came out to our house with his personal effects, all his papers and everything.

(Testimony of Perry Lynn Downing, Sr.)

Q. Personal effects and papers? A. Yes.

Q. All were sent to you?

A. Yes. There was no key. He had taken the key with him. Anyway, we didn't have a key and I opened the trunk and I think there was a blouse in there, and the first thing his wife did was to pick up a notebook—pulled out a little address book and opened it up, and there was some names in [51] there, some girls, and she said, "That is all right, Mr. Downing," and out she went. All his papers and everything was in that trunk.

Q. Were all his personal papers in that trunk?

A. Yes.

Q. They were sent to your home?

A. They were sent to our house. I don't know how they were addressed, but must have been addressed there or they wouldn't have come.

Q. This money that has come in from this insurance, where is that money now?

A. That money is in the bank. \$600 went for an insurance policy for his little girl, and that will be a \$3,000 policy and will be paid for when she is eighteen years old for an educational fund. The balance is in the bank.

Q. The insurance policy is on whose life?

A. It is on my wife's life.

Q. Payable to whom?

A. To Linda Downing.

Q. That is your grandchild, the child of your son? A. That is right.

Q. Is the money kept in some sort of fund?

(Testimony of Perry Lynn Downing, Sr.)

A. It is kept in a joint bank account in the California Bank.

Q. How is that account made up? In what names?

A. To Gertrude, I think it is—I am not exactly sure, but I [52] think it is to the wife and I for Linda Downing. All that money is to her account and we are the ones that are on there with her.

Q. You are trustees for the child?

A. That is right.

Q. Is that all fund intact except what you spent for insurance?

A. That is right, every bit of it.

Q. Is that your intention, to keep the fund in that manner?

A. That is right. I want her to get an education out of it, because we promised the boy at Chico, just before he left, that if I had one cent left I would see that the little girl got an education, for him not to worry, because there was some worry on his part when I talked to him at Salinas. He didn't open up and say anything, but I knew there was something worrying him. I said, "Are you afraid of these Japs?" And he said, "No, I am not afraid of them." I said, "Afraid of the planes?" And he said, "No, the planes are all right. That is up to the pilot." I knew something was worrying him but he wouldn't say anything. He never did talk to anybody or say anything. I said, "If you are worrying about your family, as long as I have got anything I will see that she gets

(Testimony of Perry Lynn Downing, Sr.)

taken care of some way or another." That is all I could do.

Q. Have you made a will, protecting that bank fund?

A. That is in my will for the granddaughter, every single dollar; she gets every bit of it. [53]

Q. You want no part of the fund yourself?

A. Sir?

Q. Do you want any part of this fund yourself?

A. No.

Q. Are you willing that that fund should be tied up in any manner for the protection of the child?

A. That is right. I don't want anybody else to get hold of it and throw it away. I want to see that she gets an education out of it, because that is all I can do for her.

Mr. Yunker: You may examine.

Cross Examination

By Mr. Denecke:

Q. You say you know he sent his personal effects home in a trunk. Do you know what was in the trunk that came to his wife?

A. What was in the trunk?

Q. Yes.

A. There was a lot of papers in there, personal papers and Army papers and records.

Q. No, in the trunk that came to his wife?

A. I never did see what was in there. All I seen was the things he mailed back from the Islands, a couple of dirty shirts and some things.

Q. Whom were those mailed to?

(Testimony of Perry Lynn Downing, Sr.)

A. Those went to her. The Government sent those back to her. [54] He didn't mail them, no, because that was after he was killed.

Q. You don't know what was contained in the trunk that came to Mrs. Dorothy Downing?

A. No, I didn't even know she had got one.

Mr. Denecke: That is all, your Honor.

Mr. Hamilton: No questions.

(Witness excused.) [55]

IRENE MUELLER

was thereupon produced as a witness on behalf of the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. Your name is Irene Mueller?

A. That is right.

Q. What relationship do you bear to Lieutenant Perry Lynn Downing? A. I am his sister.

Q. Do you know his wife? A. Yes.

Q. Did you have occasion to see your brother when he was here on his last furlough?

A. Quite often.

Q. When was that, do you remember?

A. It was in April. He got in the day President Roosevelt died.

Q. April, 1945? A. Yes.

Q. How did he and his wife get along in your presence?

(Testimony of Irene Mueller.)

A. Well, at that time they got along fair. They would run around together. I didn't suspect a thing at that time.

Q. I will ask you whether or not you received certain letters from your brother? [56]

A. Yes.

Q. I will ask the Clerk to hand you Exhibit No. 18.

The Court: Aren't they all going in evidence?

Mr. Yunker: I just want her to explain a certain thing.

Q. In looking at that letter, Mrs. Mueller, it makes reference in there, does it not, to where he asks you to see George's brother-in-law for some legal advice. Is that right? A. Yes.

Q. Who is "George"?

A. George is my husband.

Q. And the brother-in-law?

A. The brother-in-law is the attorney, you.

Q. In that letter he also asks you to see the brother-in-law and get some "poop." What does that mean in flight language?

A. He wanted some advice. It was just some expression—He wanted some legal advice from my brother-in-law that was an attorney.

Mr. Yunker: You may examine.

The Court: Are you related to this lady that is on the stand?

Mr. Yunker: No. It all depends.

The Court: Who is the lawyer referred to?

(Testimony of Irene Mueller.)

Mr. Yunker: That is myself. It is not any relationship, however.

Mr. Denecke: No questions, your Honor. [57]

Cross Examination

By Mr. Hamilton:

Q. You received that letter when? Do you recall? It was in 1945?

A. Yes, it was. It was just after V-J Day.

Q. After he had gone overseas? A. Yes.

Q. How did you interpret that language in the letter? What does that mean?

A. Well, from things he had talked to me about when he was home on his last furlough, he wanted to know about a separation.

Q. Things he talked to you about?

A. Well, there was some things come up and he said that she was acting that way—

Q. I think you testified a minute ago that when he was home on his furlough in April, 1945, they got along well together.

A. They got along fairly well. He went his way and she went hers. I would say, "Where is your wife?" And he would say, "She is at home. She would rather be with her mother."

Q. I want to get this straight. It seems to me these two statements are somewhat inconsistent. You first said you thought they got along fairly well together and your last statement indicates that they did not.

A. He didn't come out and state there was any trouble between them. [58]

(Testimony of Irene Mueller.)

Q. What did he say?

A. Well, I would come to his house, and I would say, "Where is Dot?" "Oh, she is home," or "She went down with her mother." I had dinner for everyone and Dorothy could not make it. I don't know why.

Q. He did not discuss it with you, is that it?

A. No, he did not discuss it. He just said, "She wants to be with her mother."

Q. As a result of that letter did you consult with Mr. Yunker? A. No, I didn't.

Q. Did you consult any lawyer? A. No.

Mr. Hamilton: That is all.

Cross Examination

By Mr. Denecke:

Q. You knew Mrs. Downing was expecting a child in about a month, did you not?

A. Yes. We all got along fine. While he was home on his last furlough, I even had a shower for her. I had no hard feelings with any of the family.

(Witness excused.) [59]

GERTRUDE I. DOWNING,

one of the defendants herein, was thereupon produced as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. You are the mother of Lieutenant Downing?

A. I am.

Q. Mrs. Downing, you filed or signed an affidavit, did you not, with the Veterans Bureau? Do you remember that? A. Yes, sir.

(Testimony of Gertrude I. Downing.)

Q. I hand you Exhibit No. 2 and ask you if you ever saw that before? A. Yes, sir.

Q. Did you sign and execute that document?

A. Well, there are some things in it that are not worded the way I signed it.

Q. Would you explain why it was you first signed that, what you were trying to effect?

A. Well, I just wanted to do what was right, what I thought was right.

Q. You have never cared for the money yourself?

A. I have no desire for any part of that money.

Q. Did you go to the Veterans Bureau in an attempt to get it straightened out so that your daughter-in-law could get the money? [60]

A. I did.

Q. And you signed that affidavit? A. Yes.

Q. I will ask you whether that part of the affidavit is true which states that your son told you in California that all the papers had been made up transferring everything to the plaintiff in this case?

A. There was nothing like that said. I just asked him if he had his personal affairs in order and he said he did have everything in order.

Q. Did you read the affidavit before you signed it? A. Well, maybe I didn't. I don't know.

Q. You were attempting to get the money for your daughter-in-law?

A. I really tried, Mr. Yunker.

Q. What is your purpose now in contesting this case?

(Testimony of Gertrude I. Downing.)

A. I want to save it now for Linda and Linda alone.

Q. I don't think your husband knew exactly how the bank account is. Just explain that.

A. The bank account is made out in the names of Gertrude I. Downing and Perry Lynn Downing, Trustees for Linda Lee Downing.

Q. You have made wills and so on protecting that fund? A. Yes.

Q. Is that your sole purpose? A. Yes.

Q. Did you know, prior to the letters you received from your son, that he was not getting along with his wife?

A. No. I felt a little bit hurt at him when we reached Chico and he came to me before he came to his wife. I felt hurt about it. I asked him then why he did not greet his wife first.

Q. Did he tell you?

A. He said he would take care of that afterwards.

Mr. Yunker: You may examine.

Cross Examination

By Mr. Denecke:

Q. With reference to this affidavit, Exhibit No. 2, you made the statement that it was not signed—not worded the way you signed it. Do you think it has been changed since you signed it?

A. I don't recall telling them that he had made out the insurance policy and had everything signed to Dorothy. I don't recall making that statement,

(Testimony of Gertrude I. Downing.)

and there is language here I think which refers to insurance and everything. I don't recall making that statement that he had changed his insurance and all to Dorothy.

Q. That statement was drawn up in the presence of Charles R. Harvey, an attorney, was it not?

A. Yes.

Q. Did Mr. Harvey have the statement typed or did you tell him [62] the story of what you think had happened?

A. Yes.

Q. And then he had it typed?

A. Yes, that is right.

Q. Didn't you and Mrs. Dorothy Downing both read that over after it was typed?

A. I don't think we did. I was just trying to get it for Dorothy at the time and I don't think I read it.

Q. You don't think you read it before you signed it?

A. I do not.

Q. You don't think you told Mr. Harvey the document correctly recited your recollection?

A. I couldn't remember.

Q. Is there anything else in the document, Mrs. Downing, other than the part about "that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife—" Is there anything there, now that you have looked at it, that is not correct?

A. He never said that he had executed all those legal documents leaving everything to his wife. He

(Testimony of Gertrude J. Downing.)

didn't say that to me and I didn't say that to anybody.

Q. You did not tell that to Attorney Harvey?

A. No.

Q. The best of your recollection is that you did not read this over? [63] A. I did not.

The Court: Did she understand all the time she was the beneficiary? You have not asked her that.

Mr. Yunker: No. I assumed that was a matter—I shall do that.

The Court: No. That is not the question, did she understand that she was not; whether she understood that she was.

Mr. Yunker: I will ask her that.

The Court: Ask her now.

Mr. Yunker: Q. Did you ever understand, or, first of all, were you told that you were the beneficiary of this policy?

A. I got a letter from the Government asking me to file for it and then—

Q. I don't mean after his death. I mean prior to his death, when the insurance was first taken out. You received, did you not, from the War Department, some forms showing you as beneficiary?

A. Yes.

Q. And showing that your husband was a contingent beneficiary? A. Yes.

The Court: Did she and her son discuss it?

A. He never discussed anything with me.

Mr. Yunker: Q. Did he discuss it with you at all? A. He did not.

(Testimony of Gertrude I. Downing.)

Q. Did he ever tell you he had changed it? [64]

A. No, sir, he did not.

Q. As far as you know, did you continue as beneficiary?

A. As far as I know, I presumed he changed it to his wife.

Q. You just presumed that?

A. I presumed.

Q. Did he tell you anything about it?

A. No, he did not.

Q. You just presumed, because of his marriage, that he did that? A. Yes.

Mr. Denecke: Q. When you made this affidavit out, where did you make it out? Was it in Mr. Harvey's office?

A. Somebody's office over in the—

Q. Lumbermen's Building?

A. Down on Stark and Third.

Q. Is was in this attorney's office, and he notarized the statement? A. Yes.

Q. Did he know anything about the situation before you and Mrs. Dorothy Downing came to him?

A. I don't know if he did or not. I think it was her attorney. I am not sure. I just went up there with her to help her to try get it.

Q. Did Mr. Harvey ask you questions concerning the things or information that he put on here?

A. He didn't ask me—I wouldn't remember. I suppose he did.

Q. Pardon?

A. I suppose he did, yes, but I don't remember.

(Testimony of Gertrude I. Downing.)

Q. To the best of your recollection, he got this information from you that was put down here, is that correct? A. He must have.

Q. Well, I mean there wasn't anyone else there besides you and Dorothy Downing?

A. No, I don't think so.

Q. You state here in this affidavit, "I believe that my son changed the beneficiary, named his said wife."

A. That was just my personal belief. I didn't know. He never talked to me about it.

Q. That was your personal belief?

The Court: She testified, while you were busy over there, that he never discussed it with her.

Mr. Denecke: I beg your pardon.

The Court: And she said she presumed that when he got married he changed it.

Mr. Denecke: Q. Do you recall this conversation when driving between Chico and Salinas, this conversation with your son concerning his personal affairs?

A. I don't recall whether we were driving or not, but I know it was between Chico and Salinas some place that I asked him if [66] he had all his affairs in order.

Q. What did he say at that time?

A. He said, "I have got everything in order."

Q. And it is your recollection now he did not say that he had made everything over to his wife?

A. He never made that statement to me at any time.

(Testimony of Gertrude I. Downing.)

Mr. Denecke: That is all.

Cross Examination

By Mr. Hamilton:

Q. Do I understand you to say at this time you do not recall the statement here to the effect, "I talked to my son, Perry L. Downing, Jr., immediately prior to the time he was assigned to duty overseas and asked him if he had arranged his personal affairs, that at said time he told me that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife"? Do I understand you to say you do not recall that that statement was in this affidavit when you signed it?

A. I do not, not all of that part of it. The last part about having executed the legal documents and leaving everything to his wife, I didn't see.

Q. What was the purpose of making this affidavit?

A. Well, at the time we wanted to change the insurance over and leave it to the daughter-in-law and let her have it and I, being the beneficiary, didn't want any part of it. [67]

Q. The statement in here about the execution of this document would be a statement you would expect to find in that affidavit, since that is what you were trying to do?

A. Yes, but I wouldn't say something I didn't hear and he never at any time said he had left everything to his wife.

Mr. Hamilton: That is all.

(Witness excused.)

Mr. Yunker: That is the defendants' case.

Mr. Denecke: I would like to call Attorney Harvey as a rebuttal witness.

The Court: Give me those authorities. You said there were a couple of decisions. Is Mr. Harvey here?

Mr. Denecke: No, your Honor. I did not anticipate we would finish so soon.

The Court: I am going to hear you in argument anyhow. We will take ten minutes recess.

(Recess.)

Mr. Yunker: We have no objection to any of their exhibits, your Honor.

Mr. Denecke: And we have no objections, your Honor.

The Court: All the pre-trial exhibits are admitted as trial exhibits and will bear the same numbers as the pre-trial exhibits.

(Thereupon the following pre-trial exhibits were thereupon received in evidence and marked as follows:)

PLAINTIFF'S EXHIBIT No. 1

Photostatic copy AAF Officers Qualification Record in re Perry Lynn Downing, Jr.

PLAINTIFF'S EXHIBIT No. 2

Affidavit signed by Gertrude Downing, dated October 21, 1946.

PLAINTIFF'S EXHIBIT No. 3

Photostatic copy of record at time of reporting for active duty, Perry L. Downing, Jr.

PLAINTIFF'S EXHIBIT No. 4

Personal Affairs Statement, Perry Lynn Downing, April 10, 1945.

PLAINTIFF'S EXHIBIT No. 5

Personal Affairs Statement, Perry Lynn Downing, December 28, 1944.

PLAINTIFF'S EXHIBIT No. 6

Application for National Service Life Insurance, Perry L. Downing, Jr., dated April 18, 1943.

PLAINTIFF'S EXHIBIT No. 7

Application for National Service Life Insurance, Perry Lynn Downing, Jr., July 2, 1943.

PLAINTIFF'S EXHIBIT No. 8

Application for National Service Life Insurance, Perry Lynn Downing, Jr., July 22, 1943.

DEFENDANTS' EXHIBIT No. 9

Letter postmarked August 15, 1945, to Mr. and Mrs. Lynn Downing, Sr., from Lt. Perry L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 10

Letter postmarked August 22, 1945, to Mr. and Mrs. [69] Lynn Downing, Sr., from Lt. Perry L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 11

Letter dated September 12, 1945, addressed to Mr. and Mrs. Lynn Downing, Sr., from Lt. P. L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 12

Letter dated September 13, 1945, to Mr. and Mrs.

Lynn Downing, Sr., from Lt. Perry Lynn Downing, Jr.

DEFENDANTS' EXHIBIT No. 13

Letter dated September 23, 1945, to Mr. and Mrs. Lynn Downing, Sr., from Lt. Lynn Downing, Jr.

DEFENDANTS' EXHIBIT No. 14

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mr. Perry Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, dated August 7, 1943.

DEFENDANTS' EXHIBIT No. 15

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mr. Perry Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, dated September 30, 1943.

DEFENDANTS' EXHIBIT No. 16

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mrs. Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, January 28, 1944.

DEFENDANTS' EXHIBIT No. 17

Report of Veterans Administration, Docket No. M-15,798 [70] in re Perry L. Downing, Jr., XC-04,012,520.

DEFENDANTS' EXHIBIT No. 18

Letter undated, signed "Lynn," addressed "Dear Sis and All."

PLAINTIFF'S EXHIBIT No. 19

Personal Affairs Statement, Glenn Christian Bauman, dated May 31, 1945.

PLAINTIFF'S EXHIBIT No. 20

Letter, Headquarters Chico Army Air Field, dated April 11, 1945, addressed to "Mrs. Downing."

PLAINTIFF'S EXHIBIT No. 21

Letter, Headquarters Chico Army Air Field, dated January 24, 1945, addressed to Mrs. Dorothy A. Downing.

PLAINTIFF'S EXHIBIT No. 22

Letter, undated, signed "Lynn," addressed "Dearest Dot and Linda."

PLAINTIFF'S EXHIBITS Nos. 23 to 29, incl.

Letters from Lieutenant Lynn Downing, Jr., addressed to Mrs. Lynn Downing, Jr.

(Recess.) [71]

1:15 p.m.

The Court: Mr. Foster, it is stipulated by counsel at the counsel table that in the absence of Mr. Holcomb, the regular Reporter, that you may take and transcribe this testimony to the same legal effect as if otherwise taken and transcribed by Mr. Holcomb in person. Call your witness.

Mr. Denecke: Charles R. Harvey.

CHARLES R. HARVEY

was thereupon produced as a witness in behalf of

(Testimony of Charles R. Harvey.)

plaintiff, in rebuttal, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Harvey, I hand you a document, Exhibit 2, an affidavit, and ask you if that is your signature at the bottom of the document.

A. That is right, that is my signature.

Q. Will you tell the Court the circumstances surrounding the taking of that document.

A. It's been some time ago. As I recall it, Gertrude Downing had been referred to me by one of the Veterans Aid Agencies—I believe it was the American Legion—in connection with a claim that she was making against the Veterans' Administration for payment of her deceased husband's insurance to her. I—— [72]

Q. Excuse me. Was it Mrs. Gertrude Downing or Mrs. Dorothy Downing?

A. It was the daughter-in-law. I think it was Dorothy Downing.

Q. Mrs. Downing is sitting here at the table?

A. That is right.

Q. All right; you may go ahead.

A. I requested, as I recall it, I requested her to have her mother-in-law call at my office, and I believe it was some time later that she came to my office with Dorothy Downing—That is, Gertrude Downing came to my office with Dorothy Downing—and after discussing the matter with them I pre-

(Testimony of Charles R. Harvey.)

pared this affidavit, and it was executed by Gertrude Downing as a sworn statement as to the facts that are related in it. I haven't read the whole affidavit yet.

Q. Now, do you recall—You say you haven't read it? A. No, I haven't.

Q. Do you recall, independent of that document, whether Mrs. Gertrude Downing told you that her son, Perry Lynn Downing, Jr., had told her that he had turned everything over to his wife and that she was to be the beneficiary of his insurance policy?

A. I don't recall the exact words, but I recall the conversation and that was the substance of it.

Q. Now, do you recall specifically—Or what is your best recollection as to her remarks about this subject? Can you [73] give those?

A. Well, I don't have any independent recollection of the words that she said, but I do have an independent recollection of the questions that were discussed, and it is my recollection that she stated that in letters that she had received from her son—I believe it was while he was stationed in California—that he had indicated that he had turned everything over to his wife, and, of course, the remaining question at that time was the insurance policy and that was mentioned specifically.

Q. Now, did you see Mrs. Gertrude Downing read that document before she signed it?

A. I always require that the affiant read an affi-

(Testimony of Charles R. Harvey.)

davit before I attach my signature and seal to it. I have no independent recollection of her reading it, but I always do require that. I never dispense with that.

Mr. Denecke: Thank you. That is all, your Honor.

Cross-Examination

By Mr. Yunker:

Q. Mr. Harvey, is it your best recollection that Mrs. Downing told you that this information was contained in letters, is that right?

A. Yes—not necessarily the specific information that on a certain date he had done a certain thing, but that that was the tenor of the contents of the letters generally.

Q. Will you look at the affidavit, and you will notice that it [74] says the information was obtained in a conversation.

A. Just a minute until I have a chance to read it. I have no independent recollection of it, but, as I say, I haven't read the affidavit before I came here, and that was last October.

Q. As a matter of fact, Mr. Harvey, the main thing you were trying to do was to effectuate some purpose that they came in to ask you to effectuate, isn't that right?

A. Yes. Gertrude Downing and Dorothy Downing were more or less cooperating in this effort.

Q. And, as far as you were concerned, you wrote

(Testimony of Charles R. Harvey.)

it down with that purpose in mind, to get that result, isn't that right?

A. That is right; at her direction I did.

Q. And, as a matter of fact, it could have been that Mrs. Downing told you part of the facts and—That is, the mother-in-law told you part of the facts—and the daughter told you facts?

A. No, I believe that the daughter-in-law had told me the facts in a previous visit to my office, and my conversation at this time was with the mother-in-law almost entirely.

Q. And your affidavit had already been prepared?

A. No, I think I typed it as they sat there. I think I did this typing myself. I am not sure of that, but that is—I believe that is the way it happened.

Mr. Yunker: That is all. [75]

Mr. Denecke: That is all, your Honor.

The Court: All right. The case is submitted. I will decide it very soon. I am ready to read the exhibits. Court is adjourned until 10:00 o'clock tomorrow morning.

(Whereupon Court was adjourned to 10:00 o'clock a.m. Wednesday, April 21, 1948.) [76]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and Glenn G. Foster, do hereby certify that on the 20th day of April, A. D. 1948, we reported in shorthand certain proceedings

had on the trial of the above-entitled cause, and that we subsequently caused our said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 76, both inclusive, constitutes a full, true and accurate transcript of said proceedings, the portion reported and transcribed by each of us being as follows: Ira G. Holcomb, pages 1 to 71, incl.; Glenn G. Foster, pages 72 to 76, incl., so taken by each of us in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 17th day of July, A. D. 1948.

/s/ IRA G. HOLCOMB,

/s/ GLENN D. FOSTER.

[Endorsed]: Filed July 19, 1948.

[Endorsed]: No. 12000. United States Court of Appeals for the Ninth Circuit. Gertrude I. Downing and Perry Lynn Downing, Sr., Appellants, vs. Dorothy A. Downing and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 29, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12000

GERTRUDE I. DOWNING and PERRY LYNN
DOWNING, SR.,

Appellants,

vs.

UNITED STATES OF AMERICA and DOR-
OTHY A. DOWNING,

Appellees.

STATEMENT OF FACTS

Comes now Gertrude I. Downing and Perry Lynn Downing, appellants herein and specify the following as the points upon which they intend to rely upon appeal:

I.

That Gertrude I. Downing and Perry Lynn Downing, Sr., were and are beneficiaries of a National Service life insurance policy on the life of their son, Perry Lynn Downing, Jr.

II.

That no change of beneficiary had been made by the said Perry Lynn Downing, Jr., to the appellee, Dorothy A. Downing, or to any one else.

III.

That there is no evidence of any valid change of the said beneficiaries.

/s/ FRANCIS F. YUNKER,
Attorney for Appellants.

Due and legal service of the within designation by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this day of August, 1948.

/s/ ARNO H. DENECKE,
Attorney for
Dorothy A. Downing,

/s/ FLOYD D. HAMILTON,
Attorney for
United States of America.

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto, acting by and through their respective attorneys, that the following designation of parts of the record of the above entitled cause are the parts of the record necessary for the consideration of the above entitled court:

1. Complaint.

2. Answer of the defendants Gertrude I. Downing and Perry Lynn Downing, Sr.

3. Answer of defendant United States of America.

4. Findings, conclusions and judgment.

5. Notice of appeal.

6. Transcript of evidence and proceedings of the trial.

It Is Further Stipulated that the exhibits introduced in evidence at the trial of the above entitled cause may be considered by the court in their original form, as though set out in the printed record.

/s/ FRANCIS F. YUNKER,
Attorney for Gertrude I. Downing and Perry Lynn
Downing, Sr.,

/s/ ARNO H. DENECKE,
Attorney for
Dorothy A. Downing,

/s/ FLOYD D. HAMILTON,
Attorney for
United States of America,

[Endorsed]: Filed Aug. 13, 1948. Paul P.
O'Brien, Clerk.

